

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIA GLORIA MELENDEZ,)
)
 Claimant,)
)
 v.)
)
 CONAGRA FOODS/LAMB WESTON,)
)
 Self-Insured Employer,)
 Defendant.)
 _____)

IC 2008-023987

IC 2009-032750

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed: November 8, 2011

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission (IIC) assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Twin Falls on February 10, 2011. Claimant, Maria Gloria Melendez, was represented by L. Clyel Berry. Defendant was initially represented by Thomas P. Baskin; however, upon Mr. Baskin's appointment as an IIC Commissioner,¹ Defendant retained Eric S. Bailey, who represented Defendant at the hearing. Although a translator was available at the hearing, Claimant ultimately testified without assistance. The parties presented oral and documentary evidence, took four post-hearing depositions and filed legal briefs. The matter was taken under advisement on July 27, 2011.

ISSUES

The parties stipulated at the hearing to the following issues to be decided by the Commission:

1. Whether Claimant's left thumb condition is due, in part, to a preexisting and/or subsequent injury or condition;
2. Whether Claimant's right thumb condition is due, in whole or in part, to a preexisting and/or subsequent injury or condition;

¹Mr. Baskin did not, in any way, participate in the development of the Referee's findings, conclusions or recommendations reached herein.

3. With respect to each alleged injury (left thumb, right middle trigger finger, right thumb), whether and to what extent Claimant is entitled to:
 - a. Reasonable and necessary medical care as provided for by Idaho Code § 72-432;
 - b. Permanent partial impairment (PPI) benefits; and
 - c. Permanent disability benefits, including either permanent partial disability (PPD) benefits or total permanent disability benefits pursuant to the Odd Lot Doctrine;
4. Whether apportionment for a preexisting and/or subsequent condition pursuant to Idaho Code § 72-406 or otherwise is appropriate; and
5. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

As addressed below, however, this list belies a simplicity in identifying the matters at issue that does not exist in this case.

CONTENTIONS OF THE PARTIES

Claimant contends that she is entitled to workers' compensation benefits related to repetitive motion injuries to her bilateral thumbs and right middle finger caused solely as a result of her work on potato lines for Employer for 33 years. She relies upon the opinions of her treating physician (Tyler Wayment, M.D.) and her treating occupational therapist (Leslie Ruby, O.T.) to support her position. Claimant seeks benefits for reasonable medical care, including her 2008 left thumb CMC joint arthroplasty and 2009 right middle trigger finger release. Dr. Wayment and Ms. Ruby agree that Claimant incurred 8% permanent partial impairment (PPI) of the whole person as a result of her left thumb injury, 2% PPI of the whole person due to

her right thumb injury and 0% PPI as a result of her right middle finger injury, with 100% of her PPI attributable to industrial activities.

Defendant counters that Claimant's hand injuries are due to hereditary osteoarthritis or other causes unrelated to her work at Employer's. They rely upon the independent medical evaluations of William D. Lenzi, M.D., who opined that Claimant has incurred 0% PPI as a result of her industrial activities.

The parties jointly retained Douglas Crum, C.D.M.S., a vocational consultant, to analyze Claimant's employability. Given the opinions of Claimant's experts as to her medical condition, as well as her non-medical factors including age, work experience, education and language limitations, Mr. Crum opined that Claimant is totally and permanently disabled as a result of her industrial injuries. However, given the opinion of Defendant's expert, Mr. Crum opined that Claimant has suffered 0% disability as a result of any workplace injuries.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Claimant, taken February 2, 2010;
3. Claimant's Exhibits 1 through 18 admitted at the hearing;
4. Defendant's Exhibits 1 through 12 admitted at the hearing;
5. The post-hearing deposition testimony of Lesley Ruby, O.T., taken March 7, 2011;
6. The post-hearing deposition testimony of Tyler Wayment, M.D., taken March 9, 2011;
7. The post-hearing deposition testimony of William D. Lenzi, M.D., taken April 15,

2011; and

8. The post-hearing deposition testimony of Douglas Crum, C.D.M.S., taken April 21, 2011.

OBJECTIONS

Claimant's objections at pages 47 and 56 of the transcript of Dr. Lenzi's deposition are sustained. All remaining pending objections in the record are overruled.

After fully considering the above-identified evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

BACKGROUND

1. Claimant was 64 years old on the hearing date and residing in Twin Falls. She grew up in Laredo, Texas, where she completed the fourth grade and became a field worker at a young age. Claimant's primary language, and the language she speaks at home, is Spanish. She understands some English, however, and testified both at her deposition and at the hearing without the assistance of an interpreter. It was apparent at the hearing and from her deposition transcript that Claimant often, at least initially, demonstrated poor understanding of the questions put to her. Nevertheless, she persevered in seeking clarification when she needed it. The record reflects that Claimant generally provided relevant responses indicating she ultimately understood most queries.

2. Since February 25, 1975, Claimant has worked on various potato processing (conveyor) lines for Defendant, picking out debris and bad product. David Duhaime, consultant

for the Industrial Commission Rehabilitation Division, documented Claimant's job description.²

3. The description indicates that on the Mash Line and Line 4, Claimant was tasked with "pressing" potatoes against a table-mounted blade to remove bad spots and blemishes. In fact, this job is accomplished by grabbing, then forcefully slamming the potatoes down onto the dull mounted blade. Sometimes, potatoes do not split on initial impact. In those cases, Claimant would sometimes strike the hand holding the partially cut potato against the blade with her free hand to drive the potato through. As evidenced by Defendant's Exhibit 12 (a videotape of an individual working on one of these lines) and Claimant's testimony, the grabbing and striking is constant because the potato conveyor moves rapidly.

LEFT THUMB INJURY

4. In late 2007, approximately 32 years after she began working for Employer, Claimant developed pain in her left wrist and at the base of her left thumb. Initially, the pain resolved each night after work and over the weekends. Further, she experienced no pain over the three-week vacation she took in December 2007. After Claimant returned to work in January 2008, however, the pain returned, suddenly and worse than before, and remained constant. At that time, Employer had a particularly heavy run of larger-than-usual potatoes.

² Mr. Duhaime recorded Claimant's job description at Claimant's Exhibit 14, p. 5:

Employee works at a large potato processing plant. Worker stands next to large conveyor belts at any of five different workstations (Mash, Line 1, B-Packaging, S-Line or Line 4). Potatoes or potato products pass by the worker, who inspects (often handles and performs different tasks with the product as needed). Examples: Mash line is fresh little potatoes. Worker removes those with poor quality or grasps potato and presses it against a table-mounted blade to remove bad spots and blemishes. Worker also removes small sticks and rocks. Line 1 is uncooked, sometimes frozen, "French Fries" going by. Worker removes those with blemishes. S-Line is similar to Line 1, but potatoes have different shapes. B-Packaging is whole or shaped frozen potatoes. Worker inspects and removes blemished products. Line 4 is large potatoes. Worker inspects, grasps with hands and presses potatoes against table-mounted blade to remove blemishes. Size of potatoes on the different lines can vary. Worker handles potato products weighing from 1 ounce to 20 ounces.

5. Claimant reported this pain to her lead lady. A written report was prepared with Claimant's assistance. An Incident Report indicates that, on February 12, 2008, Claimant reported injury onset on February 11, 2008. According to the report, Claimant "[n]oticed pain and swelling in the wrist and into the thumb after cutting large potatoes into sections using the table blade [and] [c]laims she has symptoms off and on since about December, 2007." CE 5.a., p. 2.

6. Claimant was examined by Helen Wagner, a nurse at Employer's. Ms. Wagner provided Claimant with a splint and made an appointment for Claimant with Dr. Wayment, a plastic surgeon specializing in hand conditions. Claimant had never before been treated by Dr. Wayment, and she did not participate in his selection as her treating physician.

7. At her initial appointment with Dr. Wayment, on February 22, 2008, Claimant reported left wrist pain without numbness or tingling, worse after working on the potato-cutting lines. Claimant explained that her pain used to dissipate over the weekends, but it had now become continuous. On exam, Dr. Wayment noted ulnar deviation and significant pain with palpation of the carpometacarpal (CMC) joint of her left thumb, left pisiform (a wrist bone roughly aligned with the pinky finger) and left triangular fibrocartilage complex (TFCC). He also noted a positive grind test and palpable bony osteophytes. Otherwise, Claimant had no pain with radial deviation; good wrist movement; normal 2-point discrimination in all digits; negative Watson's, shuck and distal radiolunar joint (DRUJ) instability tests; negative Tinel's sign at the wrist; and negative Phalen's sign.

8. Dr. Wayment diagnosed left CMC joint osteoarthritis and left ulnar and pisquetral pain due to her work at Employer's. He injected Claimant's thumb with a lubricating steroid compound, prescribed a splint and Naprosyn, and ordered x-rays, which demonstrated

grade II osteoarthritis in her CMC joint. In addition, Dr. Wayment restricted Claimant from lifting more than five pounds with her left hand, and from working on the potato-cutting tables.

9. On March 20, 2008, Claimant followed up with Dr. Wayment. She reported minimal relief from the injection and Naprosyn. Further, Claimant was still on the chopping line, because Employer was not complying with her restrictions. Dr. Wayment administered another injection, instructed Claimant to wear her splint as much as possible, advised that surgical intervention was her only other option and maintained her restrictions.

10. By May 8, 2008, Employer was complying with Claimant's restrictions and her wrist pain had eased. However, her thumb pain had not. She reported 8/10 pain that day. Claimant was not taking her Naprosyn as prescribed, so Dr. Wayment instructed her to do so. Conservative treatment having failed, Dr. Wayment recommended arthroscopic surgery. He also continued Claimant's Naprosyn, splint and restrictions.

11. In response to Dr. Wayment's recommendation for surgical repair, Surety ordered an IME by Dr. Lenzi.

12. On June 2, 2008, Claimant's left thumb was still painful. In addition, she was having right hand pain because she was using it more at work to compensate for not using her left hand. Dr. Wayment noted swelling over Claimant's left dorsum and, again, a positive grind test. He confirmed plans for surgery.

13. At some point following receipt of Dr. Lenzi's June 12, 2008 IME report, Surety denied further benefits until approximately late October 2008, when it authorized the recommended left thumb surgery. Details pertaining to Surety's claim handling in this case are discussed below.

14. Claimant next saw Dr. Wayment on June 19, 2008. She was upset and offended because a physician she had seen (Dr. Lenzi), for what she believed to be a second opinion, told

her that Dr. Wayment did not know what he was talking about and that her work was not the cause of her hand pain. Dr. Wayment maintained Claimant's restrictions and confirmed his recommendation for surgery.

15. On August 4, 2008, Claimant reported that her workers' compensation claim had been denied. Dr. Wayment encouraged her to seek legal counsel to pursue her claim and administered an injection into her left thumb. He also explained to Claimant that her medical insurance would cover the surgical procedure.

16. By September 12, 2008, Dr. Wayment intended to proceed with left thumb surgery, but he delayed that procedure while Defendant determined whether it would cover Claimant's right middle trigger finger surgery (see below).

17. Claimant underwent a left thumb CMC arthroplasty ligament reconstruction with flexor carpi radialis (FCR) tendon graft on November 19, 2008.³ Dr. Wayment noted no complications.

18. Claimant's recovery was slow. She was in a cast for eight weeks and, thereafter, in a splint for four more. On February 20, 2009, Dr. Wayment returned Claimant to light-duty office-type work with a five-pound lifting restriction. On April 3, 2009, he increased her lifting to 15 pounds. Claimant reported on that day that her left thumb pain had improved after surgery, but it had not completely resolved.

19. On May 29, 2009, Dr. Wayment reported that Claimant had excellent range of motion in her left thumb with moderate pain on palpation of the volar area around the CMC joint and over the dorsum, and minimal swelling. Claimant was not taking any pain medications and Dr. Wayment believed her left thumb condition would continue to improve.

20. Dr. Wayment's findings and assessments regarding Claimant's left thumb did not

³ For reasons that are unclear from the record, Claimant's right middle trigger finger surgery was delayed.

significantly change through the time of his final visit with Claimant, in January 2010. However, Claimant's persistent thumb pain incited her to take early retirement in September 2009. By that time, she was also experiencing right thumb pain (see below). Claimant testified that she would have waited to retire, had it not been for her bilateral hand pain.

21. On January 11, 2011, Claimant advised Dr. Wayment that she would like to continue treatment of her left thumb pain with splinting and injections as necessary. At the hearing, Claimant testified that her left thumb hurts less than it did pre-surgery, but worse than her other two relevant hand conditions, discussed below.

22. Dr. Wayment and Ms. Ruby agree that Claimant has sustained 8% whole person PPI as a result of her post-surgical left thumb condition, 100% attributable to her workplace activities. Dr. Lenzi did not specifically dispute that PPI assessment, but he opined that 0% of Claimant's PPI is related to her work.

RIGHT MIDDLE FINGER INJURY

23. On June 2, 2008, Claimant reported to Dr. Wayment that she was having right hand pain because she was using it more at work to compensate for not using her left hand. Dr. Wayment noted pain with palpation of her right middle finger A-1 pulley and, as well, that he could not get the finger to flex all the way down. He diagnosed right middle trigger finger due to her work at Employer's and prescribed a course of conservative treatment. In his June 12, 2008 IME, Dr. Lenzi concurred with Dr. Wayment's opinion, with respect to both the trigger finger diagnosis and the industrial causation.

24. On September 12, 2008, Dr. Wayment determined conservative treatment had failed and sought authorization from Defendant to perform a right middle trigger finger release surgery concurrently with Claimant's planned left thumb surgery. Surety accepted the claim. For whatever reason, however, Claimant did not undergo her right hand surgery until February

11, 2009.

25. Concurrently with Claimant's right middle trigger finger release surgery, Dr. Wayment excised a mass from her right shoulder. It is undisputed that this mass is not related to her employment. Dr. Wayment estimated that 20 minutes of the 73-minute surgery was attributable to repairing Claimant's trigger finger.

26. Following her trigger finger release, Dr. Wayment took Claimant off work until February 20, 2009, when he released her back to light-duty, office-type work only, with bilateral lifting restrictions of five pounds. On April 3, 2009, Claimant reported continuing pain. She also advised that Defendant had no work for her within her restrictions, so she needed a full release, without restrictions, to return to work. Dr. Wayment felt Claimant's residual pain was normal but, nevertheless, he administered a steroid injection. In addition, he liberalized her lifting restriction to 15 pounds bilaterally.

27. On July 24, 2009, Claimant's bilateral post-surgery pain still had not resolved. Dr. Wayment modified her restrictions to allow no more than four hours of line work per day with a 15-pound lifting restriction. For the remainder of her workday, Dr. Wayment limited Claimant to light-duty office-type work only, with a lifting restriction of five pounds bilaterally.

28. By September 8, 2009, Claimant's right middle finger pain finally subsided.

29. Although there is medical testimony in the record that diabetes, with which Claimant was diagnosed following onset of her left thumb pain, and other conditions, may cause trigger finger, Dr. Wayment and Dr. Lenzi both testified that Claimant's trigger finger condition is due to her work activities. It is also undisputed that Claimant sustained no PPI and, therefore, no PPD, as a result of this injury.

RIGHT THUMB INJURY

30. Also on September 8, 2009, Claimant reported worsening pain in her right thumb

over the previous couple of months to Dr. Wayment. She was still working on the sorting line. No matter where Defendant put her to work, her thumbs hurt. Dr. Wayment noted severe pain to palpation of the right CMC joint, a positive grind test and palpable bony osteophyte. Dr. Wayment discussed Claimant's work situation with her and continued her split-day restrictions. As mentioned above, Claimant's bilateral thumb pain ultimately motivated her to take early retirement in September 2009.

31. Claimant's right thumb pain persisted and, on November 20, 2009, she sought a right thumb injection. Noting x-ray findings of CMC joint space narrowing, osteophyte formation and laxity of the ligament radially deviating from the base of the metacarpal, Dr. Wayment diagnosed grade III osteoarthritis of the right thumb CMC joint and administered an injection. At his deposition, Dr. Wayment explained that the same diagnosis, same mechanism of onset and same causative factors apply to Claimant's right thumb condition as to her left.

32. On January 11, 2010, Claimant reported that the previous injection had provided some relief; however, she still had right thumb pain. Dr. Wayment noted that Claimant has a lot of pain in all of her fingers and that the pain radiates up her arm, as well. Dr. Wayment prescribed a right thumb splint. He ultimately opined that the only way to relieve Claimant's right thumb pain would be to perform the same surgery she had on her left thumb: a right thumb CMC joint arthroplasty. Dr. Lenzi did not dispute Dr. Wayment's diagnosis or treatment recommendations.

33. At the hearing, Claimant testified that her right thumb is painful, but she does not wish to undergo yet another hand surgery. Therefore, she has declined Dr. Wayment's recommendation for right thumb arthroplasty, opting instead to treat her symptoms

conservatively.

34. Dr. Wayment and Ms. Ruby agree that Claimant has sustained 2% whole person PPI as a result of her right thumb condition, 100% attributable to her work activities. Dr. Lenzi did not dispute that PPI assessment, but he opined that 0% is work-related.

SPECIFIC CAUSATION AND PERMANENT PARTIAL IMPAIRMENT OPINIONS

35. **Ms. Ruby.** A certified hand therapist since 2002, Ms. Ruby's practice focuses entirely upon upper extremity rehabilitation. She has been preparing functional capacity evaluations (FCEs) for approximately eight years and currently uses the WorkWell system, which employs standardized QuickDASH scores to calculate a patient's upper extremity functional abilities. She has been performing PPI evaluations for five or six years, and she currently relies upon the *American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition (Sixth Edition)* in calculating her PPI assessments.

36. Dr. Wayment referred Claimant to Ms. Ruby for hand therapy following her left thumb surgery. Ms. Ruby treated Claimant on three separate occasions in which, among other things, she provided a thumb spica splint and a home exercise program. Subsequently, Dr. Wayment referred Claimant to Ms. Ruby for an FCE.

37. On July 20, 2010, Ms. Ruby performed an FCE and authored a report. Ms. Ruby noted, among other things, that Claimant reported difficulty with loading and unloading the washer/dryer, vacuuming and sewing, and that she frequently dropped dishes while washing them. Her chief complaint was pain and stiffness in both of her hands. As indicated, above, Claimant had retired from working in September 2009.

38. Claimant's FCE testing was interrupted when, on a light lifting exercise, her blood pressure rate shot up to 190/110. Ms. Ruby stopped the testing while Claimant was examined by

her physician, who prescribed new blood pressure medication. Cleared for sedentary testing, Claimant returned and finished the tasks required to complete her FCE.

39. Ms. Ruby opined Claimant's test results were valid and she detected no evidence of malingering or exaggeration. "Client patterns of movement and physiological responses consistent with maximal effort." CE 3.a., p. 3. "Client pain complaints and objective signs of discomfort including frequently rubbing both thumbs and wrists are consistent with the diagnosis." *Id.*

40. Ms. Ruby found Claimant's primary limitations are due to her elevated blood pressure and her decreased fine motor skills. "Due to her poor tolerance for standing activities and resistance it is recommended that she have the opportunity to sit frequently with plenty of rest breaks during the day and not participate in resisted lifts and carries without assistance from another individual." CE 3.a., p. 1. "The client performed below average with all standardized fine motor testing due to decreased strength and decreased light touch at the volar index finger and medial thumb of both hands." *Id.* "The increase in swelling and decreased [*sic*] in AROM within the right wrist at the conclusion of testing shows low tolerance and low endurance with any fine motor tasks." *Id.*

41. Due to Claimant's limitations, Ms. Ruby opined that she is not a match for her former job: "Physical abilities do not match job requirements. The client was previously doing continual hand/fine motor tasks while sorting potatoes. Her below average performance on fine motor testing with increased pain and swelling status post [*sic*] prevent her from returning to her previous position." CE 3.a., p. 3.

42. Further, "The client does not demonstrate work tolerance for an 8 hour day, her increase in swelling occurred over a 60 minute time period. The intolerance for resisted

activities and standing was demonstrated after 2 min [*sic*] with 3# floor to step stool lifts." *Id.* Ms. Ruby understandably assessed Claimant's tolerance for standing and resisted activities in light of her blood pressure spike following floor to step stool lifts. However, Claimant testified that this was a singular event, and the record supports her testimony. This anomalous blood pressure problem was possibly an acute condition resulting from an interaction between a steroid injection and Claimant's recently diagnosed diabetes.

43. On August 11, 2010, Ms. Ruby prepared a Permanent Impairment Rating Evaluation report. Based upon Claimant's surgical history, her condition as recorded in her FCE one month earlier, her QuickDASH score of 68.2 and guidance from the *Sixth Edition*, Ms. Ruby assessed PPI of the whole person of 6% in regard to Claimant's left thumb condition, 2% for her right thumb condition and 0% for her right middle finger condition, for a total of 8% of the whole person.⁴

⁴Ms. Ruby detailed her calculations in Claimant's Exhibit 3.b., p. 21 (reprinted as in original):

The L thumb arthroplasty is a class 3 injury with a default C value of 30%. (table 15-2, pg 394) She has some ROM loss, however this appears to be bilaterally due to arthritic changes. Therefore the diagnostic category was used as stand alone. Functional History has a grade modifier of 3 (table 15-7, pg 406) and Clinical Studies has a grade modifier of 1 (table 15-9, pg 410) Physical History has a grade modifier of 2 due to complaints of pain and ROM loss (table 15-8, pg 408) (3+3)+(1-3)+(2-3) This is -3, moving 2 places to the A value of 26% digit. This converts to 10% hand, 9% UE and 6% WPI.

The R thumb has arthritic changes with a loss of AROM. This is a class 1 DI with 6% default C value. (table 15-2, pg 392) Functional History has a grade modifier of 3 (table 15-7, pg 406), Clinical Studies has a grade modifier of 1 (table 15-9, pg 410) and Physical History has a grade modifier of 2 due to complaints of pain and ROM loss (table 15-8, pg 408) (3-1)+(1-1)+(2-1)=3 This moves two positions to the right to 8% DI. This converts to 3% UE and 2% WPI.

The 2% WPI is combined with 6% WPI for a total of 8% WPI (combined values chart, pg 604)

The R MF has a loss of motion, however this appears to be due to arthritic changes throughout the hand. She reports on [*sic-no*] continued triggering, therefore the digit is a class 0 with 0% digit (table 15-2, pg 392).

44. Ms. Ruby acknowledged Claimant's finger nodules (indicative of arthritis throughout her hands) and also noted some functional loss due to peripheral neuropathy attributable to diabetes. A peripheral neuropathy diagnosis is not established by medical evidence in the record. Further, there is no allegation that Claimant's hand pain, other than in her bilateral thumb CMC joints and her right middle finger, is work-related. Therefore, Ms. Ruby only included the impact of Claimant's functional limitations due to her bilateral thumb and right middle finger injuries in her PPI assessment. Ms. Ruby's PPI opinion is well-documented and adequately supported by findings and authorities. Thus, it is a credible opinion as to Claimant's work-related functional loss.

45. **Dr. Wayment.** Dr. Wayment has consistently opined that Claimant's bilateral CMC joint osteoarthritis is work-related:

I explained to Ms Melendez [*sic*] as well as to the workers [*sic*] compensation carrier that I think that her bilateral thumb pain is related to her work. She has worked for Lamb-Weston for over thirty years, doing the same repetitive job. This has definitely caused wear-and-tear on her thumbs. Therefore, yes, I do agree that on a more probable-than-not basis, [*sic*] related to her work.

CE 2.c., p. 67.

46. Dr. Wayment has not, however, consistently stated his PPI opinion with respect to Claimant's bilateral thumb conditions. In a July 27, 2010 letter to Claimant's counsel, Dr. Wayment wrote, without elaboration, that Claimant had not suffered any PPI as a result of her left thumb surgery. This seemed inconsistent with his statement in a May 17, 2010 report that Claimant would probably require a permanent 10-pound lifting restriction, so Claimant's attorney inquired. Dr. Wayment responded on November 24, 2010, agreeing with Ms. Ruby's measurements and assessments, but curiously concluding that Claimant had sustained 6% whole person PPI, overall. At his deposition, Dr. Wayment clarified that he had reviewed and adopted

Ms. Ruby's assessment of 6% whole person PPI attributable to Claimant's left thumb and 2% PPI attributable to her left thumb, for 8% overall.

47. Dr. Wayment explained at his deposition that he does not often perform PPI assessments, so, initially, he just took a common sense approach in concluding that Claimant had not suffered any functional loss. He had not consulted any authoritative reference, nor considered the impact of either her left thumb CMC joint reconstruction or her permanent medical restrictions, in formulating his opinion. He later took these factors into account. In addition, Dr. Wayment scrutinized and concurred with Ms. Ruby's FCE findings and opinions, and adopted them as his own. He opined that they were consistent with his own observations and supported by the *Sixth Edition*.

48. Dr. Wayment's revised PPI opinion is consistent with his assessment that Claimant will permanently require a ten-pound lifting restriction and light-duty work as a result of her left thumb condition. Although typical patients are able to return to full-duty work within six months, Dr. Wayment opined, Claimant will never be able to return to full-duty work due to her hand pain. He does not believe that Claimant would be able to last for more than a few hours at her former job: "...she just doesn't have the strength or stamina to do it." Wayment Dep., p. 23. Dr. Wayment has been to Claimant's workplace and has observed people performing her former job. He described why he ruled out that kind of work for Claimant:

...it's the way they beat their hands on each other, the whole day long, to cut the potato.

...they're constantly just hitting that thumb and that pressure repeatedly just hitting the palm of that thumb all day long, every day...

Wayment Dep., p. 36.

49. Dr. Wayment believed Claimant could do light conveyor work that does not

require pounding her hands. However, he opined that Claimant's ability to do even light conveyor work would depend upon the speed and frequency with which she would have to pick items off the belt, as well as the weight of those items. This is because of her reduced grasping strength. In addition, he adopted Ms. Ruby's opinion that Claimant cannot return to any kind of work requiring repetitive fine manipulation with either hand. Therefore, the only full-time light conveyor work Claimant could do would have to require limited grabbing, no more than every 20-30 seconds, of objects weighing no more than five pounds, with either hand. However, occasional fine manipulation should be within her functional limitations.

50. **William D. Lenzi, M.D.** Dr. Lenzi is an orthopedic hand specialist practicing since 1976. He used to perform hand surgeries, but had to quit a few years ago after he, himself, underwent a right thumb CMC joint arthroplasty which he deemed unsuccessful. At Defendant's request, Dr. Lenzi performed three separate IMEs of Claimant's hand conditions, and wrote four separate reports.

51. First IME. On June 12, 2008, Dr. Lenzi first examined Claimant. He sought to determine whether Claimant's left thumb condition was work-related and, further, whether Dr. Wayment's proposed CMC joint arthroplasty surgery constituted reasonable medical treatment. On exam, Dr. Lenzi found a positive grind test and positive compression test consistent with Dr. Wayment's findings. Dr. Lenzi additionally found Heberden's nodes with early osteoarthritis of each of her four fingers. X-ray images confirmed these findings.

52. Dr. Lenzi diagnosed osteoarthritis at the CMC joints of Claimant's left and right thumbs and early osteoarthritis of the distal interphalangeal joints of each finger, though it is unclear whether this diagnosis applies to only the left hand, or both hands. He also diagnosed tenosynovitis of Claimant's right middle finger with early triggering. Only the trigger finger

condition, he opined, was work-related. Dr. Lenzi's report indicates he relied upon general statistical information, and nothing more, to support his opinion that Claimant's bilateral thumb osteoarthritis is not work-related:

It is my opinion that CM osteoarthritis of the basal joint of the thumb is not work related. It is well known that 4 out of 5 women greater than 60 years of age have osteoarthritis of the thumb. The percentage is less in men.

DE 2, p. 50.

53. Dr. Lenzi recommended that Claimant return to work with no restrictions, that she use a thumb spica splint, and that she consider CMC arthroplasty surgery (through her medical insurance) if she is unable to tolerate the discomfort.

54. Second IME. On May 13, 2009, Dr. Lenzi again examined Claimant, this time to assess whether she had reached MMI following her left thumb and right middle finger surgeries, whether she had sustained any PPI, and what, if any, work restrictions were appropriate. Dr. Lenzi noted that Claimant had not undergone any physical therapy and opined that she had not reached MMI. "I cannot over emphasize this patient is in serious need of physical therapy and is not medically stable and is not ready for final evaluation." DE 2, p. 53. He also posited that Claimant may benefit from anti-inflammatory medications or a cortisone injection into her flexor tendon sheaths.

55. Third IME. On June 3, 2010, Dr. Lenzi examined Claimant for the third and final time. X-rays of Claimant's left hand demonstrated progression of Claimant's osteoarthritis in the MP and IP joints of her thumb, and in the DIP joints of her fingers, as well as other degenerative changes. X-rays of Claimant's right hand identified progression of osteoarthritis in her thumb CMC joint and the DIP joints of her index and little fingers, as well as advanced osteoarthritis in her trapeziotrapezoid joint.

56. Examination of Claimant's right wrist revealed no atrophy of the forearm musculature, but did identify a positive grind test, positive compression test and decreased passive range-of-motion by 15% in all directions, with pain. In addition, as indicated by x-ray, Claimant had Heberden's nodes on her index and little fingers. There was mild swelling of the flexor tendons, but no triggering. Claimant could make a fist down to the distal palmar crease.

57. Dr. Lenzi confirmed his diagnosis of osteoarthritis of Claimant's right thumb CMC joint. He again opined that Claimant's osteoarthritis in her bilateral thumbs and DIP joints is not work-related, but he did not offer *any* reasoning to support his conclusion. He also opined that she had reached MMI and had suffered 0% PPI in relation to her industrial injury:

At this time, this patient is medically stable. The only work related difficulty she had was the tendinitis and the trigger finger of her right hand, which have resolved. On the basis of her work related injury, the tendinitis, there is no impairment.

DE 2, p. 57.

58. Response to FCE. On September 28, 2010, Dr. Lenzi provided his opinion with respect to Ms. Ruby's FCE. First, Dr. Lenzi found Claimant's blood pressure spike at the evaluation was anomalous as compared to her medical history and, therefore, any limitations arising from that observation are ill-founded. As noted, above, Claimant supports this opinion; she testified that she had never, before or since the FCE, experienced such an episode. Second, Dr. Lenzi suggested that Claimant manipulated findings leading to Ms. Ruby's conclusion that Claimant could not do fine motor work:

...I wish to point out that pain is a subjective response totally under the control of the patient. If she does have pain, then one should not test for strength, as strength testing in the presence of pain is not valid. Also, when one does have pain, it is very rare to have a Bell curve,⁵ as one can realize pain affects your ability for grip, pinch or fine manipulations of the

⁵ Dr. Lenzi's criticism of Claimant's results, which produced a Bell curve, are perplexing, since this distribution indicates a valid test. He does not explain why or how pain would alter this distribution.

hands.

...

Personally, I would have more confidence in function capacity evaluations if they could totally eliminate the possibility of patient manipulation and subjective reporting.

DE 2, p. 59. Notwithstanding his suggestion that Claimant manipulated her FCE, Dr. Lenzi admitted at his deposition that he had no firsthand knowledge of Claimant's behavior on that evaluation. He also confirmed that Ms. Ruby is very thorough and that he has no evidence that she would ever intentionally taint her findings. Further, Dr. Lenzi had no suggestions as to how Ms. Ruby might improve the reliability of her FCE results.

59. At his deposition, Dr. Lenzi, on redirect exam, for the first time, communicated that Claimant's pain responses subsided when she was distracted, convincing him that she was exaggerating. Dr. Lenzi did not state any findings, in any of his written reports, indicating that Claimant was exaggerating or malingering. Dr. Lenzi is a seasoned IME provider who knows the importance of findings tending to place a Claimant's credibility in issue. The evidence in the record provides no reasonable basis for why he did not contemporaneously report observations consistent with his subsequent allegation of exaggeration. The Referee finds, on this point, that Dr. Lenzi's contemporaneously prepared reports of his examinations are more persuasive than his later, contrary, deposition testimony.

VOCATIONAL REHABILITATION EVALUATION

60. **Douglas Crum, C.D.M.S.** The parties jointly sought the opinion of Mr. Crum, a vocational rehabilitation consultant, concerning Claimant's potential for returning to work. Mr. Crum reviewed Claimant's medical and IME records related to her alleged industrial hand injuries and interviewed Claimant prior to preparing his October 20, 2010 report. Prior to his

deposition, Mr. Crum additionally reviewed the hearing transcript and the transcripts of Ms. Ruby's and Dr. Wayment's depositions. In developing and communicating his opinions, Mr. Crum corresponded with both parties.

61. At the time of his report, Mr. Crum identified three different vocational scenarios: one each based on Dr. Wayment's, Dr. Lenzi's and Ms. Ruby's opinions as to Claimant's functional abilities. However, after reviewing Dr. Wayment's deposition in which he adopted Ms. Ruby's FCE and PPI opinions, Mr. Crum opined that only two scenarios are ultimately supported by the evidence in this case. The first scenario assumes Dr. Lenzi's opinion, that Claimant's bilateral thumb conditions are 0% work-related. The second assumes the consolidated opinions of Dr. Wayment and Ms. Ruby, that Claimant's bilateral thumb conditions are 100% work-related.

62. Assuming Dr. Lenzi's opinion, it is undisputed that Claimant has no work-related PPI. Therefore, she has not suffered any loss of gainful earning capacity or PPD as a result of any industrial injury.

63. Assuming the opinions of Dr. Wayment and Ms. Ruby are more persuasive, however, Mr. Crum opined that Claimant is totally and permanently disabled as a result of her industrial injuries. Claimant's bilateral thumb pain and medical restrictions due to osteoarthritis in her thumbs prevents her from engaging in repetitive fine motor activities, an ability without which she has no reasonable access to her local labor market.

64. Mr. Crum's testimony also proposes a third scenario, which is not specifically tailored to any single medical opinion but is, nevertheless, material to an understanding of Claimant's work options. He opined that if either Claimant's left thumb *or* right thumb condition is work-related, then she is totally and permanently disabled. This is because the only

work she can do, given her non-medical factors, is produce line work, which requires repetitive *bilateral* grabbing in excess of her fine motor manipulation capabilities in each hand attributable to her thumbs.

CLAIMANT'S CREDIBILITY

65. A claimant's credibility is generally at issue in a workers' compensation proceeding. Here, the scrutiny is heightened because Dr. Lenzi alleged at his deposition that Claimant exaggerated her pain during one or more of his IME examinations and, therefore, her subjective reports and testing in this regard are unreliable. The Referee finds Claimant's testimony is credible, but addresses some relevant issues, below.

66. As determined, above, Dr. Lenzi's contemporaneous reports of his evaluations, which mention no suspicions of exaggerated behavior, are more persuasive than his retrospective deposition testimony, which alleges that Claimant's pain responses subsided when she was distracted. Further, neither Ms. Ruby nor Dr. Wayment detected any evidence of exaggeration or malingering. Specifically, Ms. Ruby found that Claimant's test results were valid and that she consistently put forth full effort, even after her blood pressure spiked.

67. Dr. Lenzi generally derided FCE findings, because the patient can manipulate the outcome; however, he did not allege how or when Claimant might have manipulated her test. Given her education level and her presentation at the hearing, the Referee is unpersuaded that Claimant was sophisticated enough to manipulate her FCE results without Ms. Ruby's knowledge. Further, it is undisputed that Ms. Ruby accurately reported her observations and findings.

68. Dr. Lenzi also generally charged that strength testing is never valid in the presence of pain, but, as indicated above, he does not attempt to explain how or why pain

invalidates strength testing. Further, he does not specifically criticize any of Ms. Ruby's findings in this case. Ms. Ruby is a well-trained and experienced hand therapist who routinely assesses hand strength. Obviously, she believes strength testing in the presence of pain can produce valid results. Dr. Wayment apparently concurs. Further, evidence of strength testing in the presence of pain is commonly introduced in workers' compensation cases. (See, for example, *Juarez v. High Desert Milk*, 2011 IIC 0011 (filed February 11, 2011); *Harrison v. ATK Techsystems Ammunition Accessories*, 2011 IIC 0057 (filed August 12, 2011).

69. There is also substantial evidence in the record that Claimant found Dr. Lenzi unprofessional and antagonistic. This is not to say that an observer to their interactions may not have drawn a more favorable conclusion, but it does indicate that Claimant may have reacted differently in Dr. Lenzi's presence (for instance, more defensively) than she did with either Dr. Wayment or Ms. Ruby.

70. Further, the *Sixth Edition* cautions physicians against being automatically dismissive when evaluating the impact of aberrant pain behaviors, noting:

The appearance of symptom exaggeration can be created by fear or by having learned that certain actions or positions provoke pain...Excessive or exaggerated pain behaviors can be a response to feeling discounted or mistrusted, so that one must emphasize symptoms to persuade the physician of their reality. Anyone might dramatize a problem in an effort to have it taken seriously. Thus, symptom magnification can be an iatrogenic phenomenon that occurs when patients feel mistrusted or poorly cared for.

Id., p. 39. Claimant's language skills made it necessary for her to bring her daughter with her during her IMEs to help her communicate. In addition, Claimant was upset and confused by Dr. Lenzi's frank opinions. Under these circumstances, in combination with the objective x-ray and exam findings which indisputably establish Claimant's osteoarthritis and trigger finger conditions, the Referee finds inadequate evidence to establish that Claimant's exaggerated pain

behaviors, if any, were intentionally deceptive.

71. In addition, Claimant's recollection of dates was occasionally inconsistent with information in the record from contemporaneously maintained documents. The Referee does not find that such instances demonstrate dishonesty or ill intentions on Claimant's part. Nevertheless, where Claimant's testimony as to the date on which a relevant event occurred conflicts with information in an otherwise reliable contemporaneously made document, the Referee will adopt the date referenced in the document as being more reliable.

DISCUSSION AND FURTHER FINDINGS

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

ISSUES

72. The issues to be decided in this case are not readily identifiable from the Notice of Hearing because, although different issues pertain to each of Claimant's three injured digits, the issues listed in the notice do not differentiate which issues pertain to which injuries. Defendant has argued in its brief that none of Claimant's conditions are work-related. However, Claimant asserts that Defendant has conceded Claimant's left thumb and right middle finger conditions were caused by a workplace accident and, therefore, they should not now be permitted to contest these issues.

73. Substantial evidence in the record establishes that, at least as early as November 2008, Defendant conceded the issue of causation with respect to Claimant's left thumb and right

middle finger injuries:

a. Following Dr. Lenzi's first report, on June 12, 2008, Defendant refused to authorize treatment. In that report, Dr. Lenzi opined that Claimant's left thumb CMC injury was not work-related, but that her right trigger finger condition was. Defendant, nevertheless, did not authorize the surgical repair Dr. Wayment recommended in September 2008. Defendant apparently based its denial on the opinion of an unnamed California physician who reviewed Claimant's medical records in or about August 2008. There is no firsthand evidence of that opinion in the record.

b. Claimant filed her relevant Complaint on October 31, 2008, alleging both injuries were the result of a workplace accident (or occupational disease) on February 22, 2008. Defendant's Answer to Complaint, filed November 19, 2008, as well as its Amended Answer to Complaint, filed November 20, 2008, both admit that "the condition for which benefits are claimed was caused partly by an accident arising out of and in the course of Claimant's employment."

c. The Answer and Amended Answer are check-box forms that refer to only one "condition," whereas the Complaint arguably lists two. Defendant should have clarified in its affirmative defenses that it did not intend to concede causation of one or both conditions listed in the Complaint, if that was its position. Instead, Defendant's affirmative defenses (which are identical in both answers) do not seek to separate out the conditions in any way, particularly not in terms of workplace-relatedness:

AFFIRMATIVE DEFENSES

[case caption omitted]

I.

Except as specifically admitted herein, Defendant denies each and every allegation of the Complaint.

II.

That discovery is continuing and Defendant reserves the right to raise additional affirmative defenses as the same may be revealed in the course of discovery.

III.

That Claimant's condition is, in part, referable to pre-existing/superseding [*sic*] conditions or events not connected to her employment, and for which Defendant bears no responsibility.

IV.

That Claimant may have failed, in part [*sic*] to satisfy the *prima facie* elements of an occupational disease case.

Answer; Amended Answer.

d. On November 24, 2008, Defendant's counsel⁶ wrote a letter to Claimant's counsel, in which he acknowledged that Defendant had authorized "the surgery that was in dispute":

Confirming our discussion of this morning, please don't worry about responding to discovery requests. I understand Ms. Stevens has authorized the surgery that was in dispute. Accordingly, it would seem that we can set this matter on the back burner until further issues arise.

CE 13, p. 7. Surgical procedures for Claimant's left thumb CMC injury, as well as for her right middle trigger finger condition, were in dispute at this time. If Defendant had intended to continue resisting Claimant's left thumb claim, it should have said so. Instead, it assumed the matter should be placed in abeyance, consistent with Claimant's understanding that the parties' dispute, at least as to

⁶ Defendant's original counsel, Thomas P. Baskin, represented her until April 2, 2009, when an order was entered substituting Eric S. Bailey, her current counsel.

work-relatedness and Defendant's liability for medical benefits, had been resolved.⁷

e. Thereafter, Claimant assumed that Surety was paying her medical and TTD benefits. However, after a great deal of confusion, it was determined that Claimant's payments were actually being made by third party insurers. On February 23, 2009, Claimant's attorney wrote the first of many letters to Defendant's counsel to obtain payment for her worker's compensation benefits. In response, Defendant addressed payment delay issues, without asserting that either of her relevant hand conditions were not compensable.

f. On April 14, 2009, the parties participated in a telephonic conference with Referee Veltman, after which she entered an order reflecting that the parties had agreed to work out payment issues between them. Ensuing correspondence from Claimant indicates further attempts to obtain payment for her benefits. On May 20, 2009, Defendant's attorney responded by encouraging Claimant to go to physical therapy (in part, to treat her left thumb), as recommended by Dr. Lenzi in his May 13, 2009 report, and assuring that Claimant's mileage reimbursement and per diem payments would be made.

g. On June 18, 2009, Defendant's attorney wrote to check on the status of Claimant's physical therapy, noting that Surety had previously approved it and also commenting that the claim should be on track toward a quick resolution.

h. On June 28, 2010, Claimant's attorney wrote a letter to Defendant's attorney memorializing a telephone conversation between them. Among other things, Claimant's attorney wrote:

⁷ Defendant did not assert that its treatment authorization was subject to a reservation of rights.

From our telephone conversation of June 28, 2010, it is my understanding that irrespective of Dr. Lenzi's opinion regarding left thumb presentment, the surety is not re-reversing its position to now allege lack of causal relation. It is my understanding that current issues encompass apportionment by reason of left CMC presentment; and, pure causation regarding recent right thumb presentment commencing in September, 2009.

CE 14, p. 29. There is no evidence in the record suggesting that Defendant, in any way, signified, at the time, that they disagreed with Claimant's understanding.

i. On April 12, 2010, Defendant filed its Response to Claimant's Request for Calendaring. Defendant did not indicate pure causation was an issue as to any⁸ of Claimant's alleged workplace injuries. It did, however, list as issues, whether Claimant's condition (without differentiating among her injuries) is, *in part*, due to a preexisting condition and the corollary issue of whether or not apportionment is appropriate under Idaho Code § 72-406.

j. On August 3, 2010, Claimant's attorney again wrote to Defendant's attorney seeking clarification as to the causation issues in dispute:

Lastly, regarding Dr. Lenzi's opinions regarding causation. With respect to left thumb and right middle trigger finger presentments, from my earlier telephone conversations with you and as I attempted to confirm within my correspondence to you of June 28, it is my understanding that the only issue regarding causation is with regard to Ms. Melendez' right thumb presentment and that your clients, commencing with Tom Baskin's representation of them and continuing through your representation, to current, have conceded causation regarding left thumb and right middle trigger finger presentments.

CE 14, p. 33. According to the record, Defendant, again, did not object to Claimant's understanding.

⁸At that point, Claimant's case regarding her right thumb CMC injury had been consolidated with her previously filed case claiming benefits for her left thumb and right finger injuries.

k. Claimant's communications with Defendant's third party adjustor, not recounted herein, yield no relevant contradictory information.

74. At the hearing, Defendant still did not assert that there is no causal connection between Claimant's left thumb and right middle finger conditions and her work for Employer. Instead, they acquiesced to Claimant's understanding of the issues:

MR. BERRY: Your Honor, before we move on - - and I apologize - - the first issue whether the claimant's condition is due in whole or in part, that is not an issue that was noticed by either the claimant or the defendant.

REFEREE MARSTERS: Okay. So that's just in there for no apparent reason whatsoever. Then we'll get rid of it. Any other corrections or clarifications?

MR. BAILEY: And there's - - I think there's some additional - - when we were talking about the physical parts of the body at issue here, I think there's more.

MR. BERRY: The whole or in part, I agree with regard to the right thumb.

MR. BAILEY: And then how about the left thumb? That's - -

MR. BERRY: The left thumb, it was my understanding - - in fact, looking at the original counsel for defendant's answer - - it was conceded in the answer that there was at least partial causation. And I think that the answer's never been amended.

And, originally, to bring the history of the claim to current - - and Mr. Bailey was not the original defense counsel; Mr. Baskin was - - but, originally, the claim was denied with regard to the left thumb; it was accepted with regard to the right-middle trigger finger.

And at that juncture, I filed the complaint. And then I received a telephone call from a representative for the self-insured and was advised, telephonically, that they would concede causation with regard to the right thumb. And subsequently, Mr. Baskin wrote me in a letter - - in fact, it's in one of the claimant's exhibits - - concurring that the right thumb would, in fact, be conceded as compensable.

REFEREE MARSTERS: [Off-topic comments by Referee excluded]...Go ahead, Mr. Bailey.

MR. BAILEY: I was thinking - - my understanding was the left thumb, but we'll talk about that. And I think - -

MR. BERRY: Did I say "right thumb"?

MR. BAILEY: Yeah.

MR. BERRY: I'm sorry. It's with regard to the left thumb.

MR. BAILEY: And then I thought - - and maybe I'm mistaken - - but Mr. Baskin had identified a February 11, 2008, carpal tunnel.

MR. BERRY: What that was is that the February answer is with regard to the right-middle trigger finger.

MR. BAILEY: Right. Correct.

MR. BERRY: And Mr. Baskin and I had a telephone conversation because we alleged that the right-middle trigger finger, that the onset was by reason of the left thumb being impaired, and she was in a left-thumb-and-wrist splint, and so it would be a natural progression with regard to the original injury. I asked Tom whether or not he wanted me to file a separate complaint, and he said, "Don't worry about it."

MR. BAILEY: So are we just going to - - just to make sure we're clear, are we going to have three separate accident dates, 02/11/08, carpal tunnel; 02/22/08, right trigger finger; 09/08/09, thumbs?

MR. BERRY: My understanding was that, basically, the original date of injury of 02/11/08 would encompass the left thumb and the right-middle finger.

MR. BAILEY: Okay.

MR. BERRY: And that the subsequent 09/28/09 would be the right thumb.

MR. BAILEY: Okay. Gotcha.

REFEREE MARSTERS: And that's, generally, my understanding as far as those dates and those general injuries.

MR. BAILEY: Okay.

REFEREE MARSTERS: Okay. Thank you. Anything else with regard to the issues? Okay. Very good.

Let me, then, move on to the exhibits...

Tr., pp. 16-20. Claimant set forth a detailed understanding of issues to be determined at the hearing; specifically, that pure causation was an issue with respect to the right thumb injury, partial causation with respect to the left thumb injury, and that there is no causation issue at all regarding the right middle trigger finger injury. The only correction Defendant made to Claimant's statement of understanding was to correct Claimant's attorney's error in referring to the left thumb as the right thumb.

75. The Referee finds that the parties stipulated at the hearing to the issues set forth above, in the issues section of this decision. Although Defendant did not specifically state its position, it did not object to Claimant's statement of the issues. Further, Claimant's rendition at the hearing regarding her left thumb and right middle finger injuries is consistent with the evidence in the record of her communications with Defendant of her understanding of these issues since November 2008, which Defendant did not challenge prior to the hearing.

76. There is no affirmative evidence in the record that Defendant ever intended, between November 2008 and the time it filed its post-hearing brief, that it intended to make pure causation a hearing issue with respect to either Claimant's left thumb or right finger conditions. With respect to the right middle finger, Defendant's position stated in its brief is especially perplexing, since no medical expert opinion in evidence asserts that this injury is *not* work-related.

77. The Referee finds Defendant's notice with respect to these issues is untimely and inadequate to overcome the stipulation of the parties at the hearing. Therefore, only the stipulated issues as set forth in the issues section, above, will be addressed herein.

CAUSATION

The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967).

The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Drapo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine, Id.*

The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993).

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. *Larsons, The Law of Worker's Compensation*, § 13.

A claimant need not show that he suffered an injury at a specific time and at a specific

place. *Hazen v. Gen. Store*, 111 Idaho 972, 729 P.2d 1035, (1986), *rehearing denied* (1986); *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983). The accident need only be reasonably located as to the time when and the place where it occurred. *See Spivey v. Novartis Seed, Inc.*, 137 Idaho 29, 43 P.3d 788 (1981), (holding that the claimant need only prove the day and place of the accident). An employee incurs an injury in the course of employment if the worker is doing the normal duties that he is employed to perform. *Id.*

The Idaho Supreme Court has rejected an overly narrow and overly technical interpretation of “accident”:

This Court has refused to adopt an overly narrow and overly technical construction of an “accident” requiring that an employee slip or fall, or that the machinery fail, or that the worker do something other than what he habitually does. [*Wynn*.] Under our Worker’s Compensation law, “Accident” means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs and which can be reasonably located as to time when and place where it occurred, causing an injury. I.C. § 72-102(18)(b). In [*Verdene Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005)], this Court held that the mere rising from a chair constituted an accident when it resulted in a sudden injury to an employee’s knee. [citation omitted]. In [*Spivey*], this Court held that when a seed sorter reached across the belt and injured her shoulder during her normal work routine this constituted an accident. [citation omitted]. In *Hammond v. Kootenai County*, 91 Idaho 208, 209, 419 P.2d 209, 210 (1966), we held that an accident occurred when a deputy sheriff with arterial disease died from a ruptured or occluded cerebral blood vessel after having climbed up and down a roadside embankment at a nighttime car crash scene.

Stevens-McAtee v. Potlatch Corp., 145 Idaho 325, 179 P.3d 288 (2008).

Left thumb. As determined, above, the Commission must decide whether Claimant’s left thumb CMC osteoarthritis is due, in part, to a non-work-related cause. There is no evidence that Claimant had osteoarthritis before she began working for Employer in 1975. Further, there is no allegation that any other traumatic event or series of events, other than those at work, contributed to this condition. The question posed by the medical evidence is, did a hereditary

component contribute to onset of her symptoms?

78. Dr. Wayment opined that osteoarthritis can result from repetitive trauma, such as the work Claimant did for Employer for 33 years. Dr. Lenzi did not hesitate in agreeing:

Q. ...so a direct blow then to the base of the thumb over a matter of time could be a contributing factor?

A. Surely. To any joint.

Lenzi Dep., p. 50. Further, he opined that such damage is permanent:

A. I think that if she was at home knitting, or driving, as you do it more and more, as the joint wears out, the thumb is going to get more painful.

Q. Because life happens?

A. Well, because time wears further. You don't get to roll the speedometer back on the engine every time you take it out of the garage and it is brand new. It is just a continuation of all of the rest of your driving.

Id., pp. 63-64.

79. Importantly, Dr. Lenzi also opined that initial onset after 30 years is not inconsistent with the conclusion that Claimant's bilateral thumb osteoarthritis pain was brought on by repetitive trauma:

Q. ...[I]f we were to hypothesize that the repetitive motion that this lady used in her work was supposedly the cause of her arthritis in her thumbs, why would it take 30 years for that to develop? Or would it?

A. It could develop at any pace. That is why we are human beings. We are not all alike. It goes more slow in some people. Faster in others. Or how much intensity there is with the work. There is [*sic*] so many variables. That is why it is so different. Some people don't grab the toothbrush in the same way.

Lenzi Dep., pp. 59-60.

80. Nevertheless, Dr. Lenzi was adamant that Claimant's bilateral thumb osteoarthritis, as well as the arthritis he diagnosed throughout her hands, is not in any way the

result of trauma but, instead, is a hereditary condition. At his deposition, for the first time, he explained that his opinion was based on the presence of Heberden's nodes (osteophytes) in Claimant's CMC joints of her thumbs and DIP joints of her fingers. First, he testified that the presence of these nodes denotes arthritis caused by trauma. Eventually, however, it became clear that Dr. Lenzi was correlating Claimant's Heberden's nodes with a hereditary cause of her osteoarthritis:

Q. I have seen in the limited amount of reading that I did that there is some correlation in some of the studies to [sic] trauma or repetitive trauma involving the hands as a potential cause of osteoarthritis.

A. That occurs for any joint. If you have trauma, and you have constant concussion of the joint, or beating it up, you will see arthritis of the thumb. However, this falls into a pattern. You not only have arthritis at the base of the thumb, but it is very commonly followed with arthritis at the distal tips of the fingers. Distal interphalangeal joints. It starts out as little bumps called Heberden's nodes. So you not only see arthritis down here, but you'll see it up here. Somebody in my family, for example, my mother, had extremely severe arthritis. I got arthritis at the base of my thumb. I have had a new joint put in. But I also have arthritis at the distal joints.

...

Q. How does our discussion about the causes of arthritis at the base of the thumb related to Ms. Melendez, in particular? How did you reach the conclusion that it is more likely than not that her arthritis was not brought about by work, but by other factors?

A. For the reason I just stated. That not only do we have arthritis at the base of the thumb, but we don't have any evidence of direct contusion of the joint. But, importantly, we can see a definite pattern of base of the thumb, distal interphalangeal joint, and question of a PIP joint. I think it is the right long finger...

Q. And this is a pattern that you recognize from experience?

A. I'll see two or three a day, at least.

Lenzi Dep., pp. 9-11.

81. According to Dr. Lenzi, a purely genetic etiology for osteoarthritis, in some cases, is generally accepted in the medical community. However, no specific genetic marker has yet been identified. Therefore, there is no scientifically provable way to determine whether any particular individual is genetically predisposed to osteoarthritis.

82. Following the hearing, in his post-hearing deposition, Dr. Lenzi relied upon the presence of Heberden's nodes in Claimant's hands to rule out trauma as a cause of her osteoarthritis. This implies that these features do not accompany osteoarthritis brought on by trauma. However, Dr. Lenzi neither stated this, nor ruled out other precursors to Heberden's nodes. Dr. Wayment, on the other hand, implied that these formations can also occur in patients with osteoarthritis caused by trauma.⁹ The evidence on this point is in equipoise and, therefore, it is insufficient to establish that osteophyte formation/Heberden's nodes in Claimant's hands rules out trauma as the cause of Claimant's osteoarthritis.

83. It is somewhat unsatisfying that Dr. Wayment did not directly address Dr. Lenzi's opinion regarding heredity as a cause for Claimant's bilateral thumb osteoarthritis. However, this does not demonstrate evasiveness on Dr. Wayment's part, given Dr. Lenzi's late-breaking opinion in this regard. Dr. Lenzi did not divulge this reasoning in any of his reports. According to the record, Dr. Lenzi first revealed this thinking through his deposition testimony, to which there was no automatic opportunity for rebuttal. This, even though Claimant sought such information through discovery.¹⁰ Further, Rule 10 prohibits the presentation of new evidence by post-hearing deposition. Dr. Lenzi's testimony regarding heredity is new evidence developed

⁹Dr. Wayment identified osteophyte formation in Claimant's wrists. Nevertheless, he opined that her osteoarthritis was most likely caused by workplace trauma, alone.

¹⁰ On June 25, 2010, Defendant failed to provide this information in response to Claimant's Interrogatory No. 3 (d)(2) seeking the substance of the opinions to which Defendant's experts were expected to testify.

after the hearing and, as such, it is given no weight.¹¹

84. Dr. Lenzi also cited a general statistic, that 80% of women Claimant's age have osteoarthritis in their thumbs, in support of his opinion that her condition is not work-related. General statistics, however, form an inadequate basis, alone, on which to predicate an opinion as to the etiology of any given individual's medical condition. This statistic is insufficient on its face to establish any given cause of Claimant's osteoarthritis.

85. Dr. Wayment was Claimant's treating hand physician and surgeon for all of her relevant hand conditions. In addition, he has visited Claimant's work site to educate himself as to the actual hand motions required of someone in Claimant's job. At his initial examination of Claimant, Dr. Wayment opined that her left thumb osteoarthritis is consistent with, and most likely due to, her work activities. He maintained that opinion throughout these proceedings. Dr. Wayment's opinion in this regard would apparently be supported by Dr. Lenzi, but for the fact that Claimant has Heberden's nodes in her fingers. The evidence does not establish that Heberden's nodes rule out trauma as a cause of Claimant's hand osteoarthritis.

86. The Referee finds Dr. Wayment's opinion is more consistent with all of the evidence in the record and is, thus, more persuasive than Dr. Lenzi's. As a result, Claimant has proved by a preponderance of evidence that her left thumb CMC joint osteoarthritis was caused by repetitive hand motion and trauma at work. Defendant has failed to prove Claimant's osteoarthritis in any way preexisted her hiring at Employer's or that an alternate cause contributed to its onset.

87. The Referee further finds that the evidence of Claimant's onset of unrelenting osteoarthritis pain in her left thumb on or about February 11, 2008, from grabbing and smashing

¹¹ Dr. Lenzi's first report states four out of five women over 60 have osteoarthritis; however, he does not, anywhere, indicate that any of those four affected women had a genetic predisposition to the condition.

large potatoes at work, is sufficient to establish that her left thumb injury resulted from a workplace accident. Although Claimant does not identify a specific moment in time when her pain became permanent, she has proven that one of those grabbing and smashing actions, on or about February 11, 2008, acutely incited her left thumb symptoms and alerted her to a need for treatment.

88. **Right thumb.** Next, the Commission must determine whether Claimant's right thumb CMC joint injury is work-related. Following Claimant's left thumb injury, she relied more upon her right hand at work. Dr. Wayment opined, persuasively, that the same diagnosis, same symptom onset trigger and same original causal factors (repetitive grabbing and smashing at work) apply to Claimant's right thumb CMC joint osteoarthritis as to her left thumb CMC joint osteoarthritis. For the same reasons the Referee found Claimant's left thumb CMC joint osteoarthritis is industrially related, the Referee also finds Claimant's right thumb CMC joint osteoarthritis and symptomatology is due to her work activities at Employer's.

89. The Referee further finds that the evidence of Claimant's onset of unrelenting osteoarthritis pain in her right thumb on or about September 8, 2009, from grabbing items off the conveyor lines, is sufficient to establish that her right thumb injury resulted from a workplace accident. Although Claimant does not identify a specific moment in time when her pain became permanent, she has proven that one of those grabbing actions, on or about September 8, 2009, acutely incited her right thumb symptoms and alerted her to a need for treatment.

REASONABLE MEDICAL CARE

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the

treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). “Probable” is defined as “having more evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

90. Defendant does not argue that Claimant’s left thumb and right trigger finger surgeries, or any of the medical treatment she has received for any of her three relevant injuries, were not reasonable. In fact, Dr. Lenzi recommended left thumb CMC joint arthroplasty, so long as it was Claimant-financed, in his first IME report. The medical evidence offered by both Dr. Wayment and Dr. Lenzi amply supports the conclusion that the medical care Claimant received was reasonable. Claimant's conditions have improved, if not completely, from the care she has received, including surgery and related treatment for her left thumb condition and right middle trigger finger, and diagnostic and related treatment for her right thumb condition.

91. Claimant seeks reimbursement for bills related to treatment for her bilateral thumb conditions. Defendant does not dispute her calculations.

92. With respect to Claimant’s March 2009 trigger finger surgery, during which she also had a shoulder mass excised, Dr. Wayment testified that it would be appropriate to divide the bill in proportion to the amount of time he spent performing each procedure. Along those lines, he testified that he spent 20 minutes out of a total surgical time of 73 minutes repairing Claimant’s trigger finger, and the rest was dedicated to excising her shoulder mass. There is no specific workers’ compensation law either allowing or requiring apportionment of medical

benefits. However, it has rarely, if ever, been done. In this case, the evidence is clear on two important factors: first, one of the procedures Claimant underwent in March 2009 was clearly work-related and the other was clearly not; and, second, the conditions repaired at surgery were entirely separate from each other in terms of the surgical procedures performed, such that a reasonably accurate division of time and costs appropriated to each problem could be ascertained. As well, the non-work-related shoulder mass (a fatty tumor) was not a condition that the physician felt ethically predisposed to address at the same time as the work-related trigger finger. Under these circumstances, it is not reasonable to require Defendant to pay the costs associated with Claimant's shoulder mass excision. The Referee finds Defendant is liable for 20/73rds of the total cost of this procedure.

93. The Referee finds that Defendant is liable for the cost of Claimant's reasonable medical care related to treatment of her bilateral thumb osteoarthritis and right middle trigger finger, including but not limited to costs associated with her November 2008 and March 2009 surgeries. With respect to her March 2009 procedure, Defendant is liable for 20/73rds of the total of all surgical costs incurred.

94. The Referee declines to liquidate the amount owed by Defendant to reimburse Claimant for her past medical treatment. Claimant has attempted to itemize her actual costs; however, there is evidence that she was not required to pay the full invoiced amounts of all of her relevant medical bills. Further, there is inadequate evidence pertaining to the existence or nonexistence of any subrogation agreements to warrant the assessment in these proceedings of a fixed and final amount due to Claimant. The parties are directed to work out the amount due between them, consistent with the findings and holdings herein, and in compliance with Idaho

Code § 72-432, *Neel v. Western Construction*, 147 Idaho 146, 206 P.3d 852 (2009) and, of course, all other applicable law.

PPI/PPD

“Permanent impairment” is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. “Evaluation (rating) of permanent impairment” is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker’s personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and on specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and § 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden

of establishing permanent disability is upon a claimant. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1985).

95. It is undisputed that Claimant incurred no PPI due to her trigger finger condition. As a result, the Referee finds Claimant incurred 0% PPI and 0% PPD attributable to her trigger finger condition.

96. With respect to her post-surgical left thumb CMC joint condition, Dr. Wayment and Ms. Ruby each opined that Claimant has reached MMI and has sustained PPI of 6% of the whole person. With respect to her right thumb CMC joint condition, they opined she has incurred PPI of 2% of the whole person. Although Dr. Wayment recommended surgical repair, Claimant declined to undergo another surgery. Therefore, a PPI assessment is appropriate because Claimant has proven that she is no longer in a period of recovery. Dr. Lenzi did not offer a PPI opinion because he concluded that Claimant's bilateral thumb conditions were unrelated to her work. However, he also did not strongly dispute the assessments provided by Dr. Wayment and Ms. Ruby, admitting that he did not run any calculations and positing that he would assess "a few points" for these conditions.

97. The proposed PPI assessments are perplexing, given that Claimant's left thumb condition, which has been repaired, carries a greater permanent impairment rating than her right thumb condition, which is arguably worse than her pre-surgical left thumb and has not yet been repaired. Nevertheless, the factual basis and impairment assessment authority upon which Dr. Wayment and Ms. Ruby base their agreed-upon PPI conclusions is reasonably sound and, thus, their concurring opinions are persuasive. Therefore, the Referee finds Claimant has sustained 8% PPI of the whole person.

98. The Referee further finds Mr. Crum's undisputed opinion as to Claimant's PPD is

credible. He opined that, based upon her medical and non-medical factors, Claimant would have virtually no access to the market if *either* her left thumb condition *or* her right thumb condition were found to be work-related. This is because the only jobs Claimant can do require repetitive bilateral fine manipulation abilities. In developing this opinion, Mr. Crum also considered Claimant's non-medical factors, including her fourth-grade education, her age at the hearing of 64, her remedial English language skills, and her relevant past work experience spent entirely on produce processing lines.

99. Based upon Dr. Wayment's and Ms. Ruby's persuasive concurring opinions, Claimant lacks fine manipulation abilities and grasping strength in both hands due to her workplace injuries. Dr. Wayment elaborated by further opining that Claimant cannot grasp items more often than once every 20-30 seconds, and that those items must weigh less than five pounds. In addition, he has opined Claimant has a ten-pound overall lifting restriction, with either hand. Mr. Crum opined that the only work Claimant is qualified to do falls outside these restrictions.

100. Based upon Mr. Crum's vocational opinion and the Referee's functional findings, above, the Referee finds Claimant is 100% disabled as result of either of her industrial thumb injuries and her non-medical factors.

APPORTIONMENT

101. Idaho Code § 72-406 provides for apportionment of benefits where a Claimant's industrial injury was worsened by a pre-existing condition. There is inadequate evidence of any such relevant condition in the record. Therefore, the issue of apportionment is moot.

ATTORNEY FEES

Idaho Code § 72-804 provides that if the Commission determines that the employer contests a claim for compensation made by an injured employee without reasonable ground or the employer neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee the compensation provided by law or without reasonable ground discontinued compensation as provided by law, the employer shall pay reasonable attorney fees in addition to the compensation provided by law.

102. Claimant argues that Defendant unreasonably denied payment on each of her thumb claims because the medical reports it relied upon in denying her claim, prepared by Dr. Lenzi, cited an inadequate basis to reasonably support his conclusion that the injury was not work-related. She cites *Jones v. North American Sales and Ace American Insurance Co.*, 2008 IIC 0030 (filed January 24, 2008), for the proposition that:

Merely conflicting medical evidence alone is insufficient to avoid an award of attorney fees. The statute requires reasonable grounds to support denial of the claim. While 'reasonable grounds' are not defined in the statute, the Commission determines that the Legislature did not intend for Defendants to circumvent the statute by providing unfounded medical opinions and basing their denial of benefits on such opinions.

Id. The claimant in *Jones* was awarded attorney fees because the IME examiner in that case opined that the injury was not work-related, solely on the basis of general statistics establishing that a large proportion of people over age 55 had the same injury as the claimant, but were asymptomatic. The claimant in that case was 43.

103. Similarly, Dr. Lenzi's only pre-hearing basis for concluding that Claimant's thumb injuries were not work-related was that 80% of women her age have osteoarthritis. Unlike the claimant in *Jones*, Claimant fits within the age restriction of the general statistic Dr. Lenzi cited. Even so, the general statistical information Dr. Lenzi relied upon is patently

inadequate to establish whether or not trauma caused Claimant's osteoarthritis in her thumb joints. Even assuming the Commission should rule against Claimant based on unfavorable odds alone, Dr. Lenzi's statistic only addresses prevalence and says nothing about etiology. According to his testimony, the affected four out of five women could just as easily have trauma-induced osteoarthritis as osteoarthritis from some other cause.

104. Prior to the hearing, Dr. Lenzi did not provide any sound basis specific to Claimant for ruling out trauma as a cause of her osteoarthritis; nor did he provide any reasonable medical basis for opining that Claimant presented with features specifically denoting her as someone who would manifest osteoarthritis symptoms even in the absence of trauma.

105. The Referee finds Dr. Lenzi's opinions regarding Claimant's bilateral thumb conditions, rendered in his reports prior to the hearing, were purely conclusory. Defendant's reliance upon these reports to deny Claimant's benefits was unreasonable. Further, although there is a reference in correspondence to a California physician's opinion obtained by Defendant before it authorized treatment in fall 2008, there is no firsthand evidence of that individual's opinion; therefore, it is given no weight and cannot serve as an evidentiary basis for determining whether Defendant's denial was unreasonable. Claimant has established that she is entitled to attorney fees related to her litigation of these claims.

106. Claimant also argues she is entitled to attorney fees related to treatment for her trigger finger condition because Defendant unreasonably delayed her benefit payments. The evidence on this point is greatly confusing, with footnote 1 at Claimant's Exhibit 4.b., p. 27 acknowledging payment for half the cost of this surgery, while Claimant's closing brief alleges more than \$3,000 in arrears. Even more confusing, however, is why Defendant pursued this claim to hearing, apparently arguing no causal link in its brief, when its own IME expert opined

from the beginning that this condition was work-related and Claimant did not dispute his 0% PPI opinion.

107. The Referee finds that Defendant unreasonably relied upon Dr. Lenzi's conclusory opinions in denying Claimant's claims for benefits related to her bilateral thumb conditions and opposed Claimant's right middle finger claim without any medical opinion basis whatsoever. Claimant is entitled to an award of attorney fees related to her litigation of each issue in this case.

CONCLUSIONS OF LAW

1. Claimant has proven her osteoarthritis in her bilateral thumb CMC joints and her right middle trigger finger condition were all caused by repetitive motion injuries she sustained at work.

2. Claimant has proven that she is entitled to reasonable and necessary medical care for her bilateral thumb CMC joint injuries and right middle trigger finger injury, including but not limited to her left thumb surgery in November 2008 and her trigger finger release in March 2009.

3. Claimant has proven that she is entitled to PPI in the amount of 8% of the whole person (6% in relation to her left thumb condition, 2% in relation to her right thumb condition and 0% in relation to her right middle trigger finger).

4. Claimant has proven that she is totally and permanently disabled as a result of her non-medical factors and either her left thumb CMC joint injury or her right thumb CMC joint injury.

5. Claimant has proven she is entitled to attorney fees under Idaho Code § 72-804 for Defendant's unreasonable denial of benefits related to her industrial injuries to her bilateral thumbs and right middle finger.

6. All other issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 19th day of October, 2011.

INDUSTRIAL COMMISSION

/s/
LaDawn Marsters, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2011, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

L CLYEL BERRY
PO BOX 302
TWIN FALLS ID 83303-0302

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

SW

Lara Winters

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIA GLORIA MELENDEZ,)
)
 Claimant,)
)
 v.)
)
 CONAGRA FOODS/LAMB WESTON,)
)
 Self-Insured Employer,)
 Defendant.)
 _____)

IC 2008-023987
IC 2009-032750

ORDER

Filed: November 8, 2011

Pursuant to Idaho Code § 72-717, Referee submitted the record in the above-entitled matter, together with her recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has proven her osteoarthritis in her bilateral thumb CMC joints and her right middle trigger finger condition were all caused by repetitive motion injuries she sustained at work.

2. Claimant has proven that she is entitled to reasonable and necessary medical care for her bilateral thumb CMC joint injuries and right middle trigger finger injury, including but not limited to her left thumb surgery in November 2008 and her trigger finger release in March 2009.

3. Claimant has proven that she is entitled to PPI in the amount of 8% of the whole person (6% in relation to her left thumb condition, 2% in relation to her right thumb condition and 0% in relation to her right middle trigger finger).

4. Claimant has proven that she is totally and permanently disabled as a result of her non-medical factors and either her left thumb CMC joint injury or her right thumb CMC joint injury.

5. Claimant has proven she is entitled to attorney fees under Idaho Code § 72-804 for Defendant's unreasonable denial of benefits related to her industrial injuries to her bilateral thumbs and right middle finger.

6. All other issues are moot.

7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 8th day of November, 2011.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

Recused

Thomas P. Baskin, Commissioner

/s/

R.D. Maynard, Commissioner

ATTEST:

/s/

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

L CLYEL BERRY
PO BOX 302
TWIN FALLS ID 83303-0302

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

srn

/s/_____